

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

JAMES WEISMANN, an individual,  
  
Plaintiff,  
  
v.  
  
CALIBER HOME LOANS, INC., a  
corporation, and DOES 1 to 100,  
  
Defendant.

CASE NO. 16cv203-GPC(BLM)

**ORDER GRANTING  
DEFENDANT’S MOTION TO  
DISMISS**

[Dkt. No. 19.]

Before the Court is Defendant Caliber Home Loans, Inc.’s (“Caliber”) motion to dismiss all claims alleged in the first amended complaint. (Dkt. No. 19.) An opposition and reply were filed. (Dkt. Nos. 21, 22.) Based on the reasoning below, the Court GRANTS Defendant’s motion to dismiss with prejudice.

**Background**

On January 27, 2016, the case was removed from state court. (Dkt. No. 1.) On August 8, 2016, the Court granted Defendant’s motion to dismiss all causes of action with leave to amend. (Dkt. No. 13.) On August 26, 2016, Plaintiff filed a first amended complaint (“FAC”) alleging state law causes of action of negligence, intentional infliction of emotional distress and bad faith breach of contract. (Dkt. No. 14.)

Around September 30, 1999, Plaintiff James Weismann (“Plaintiff”) purchased the property located at 11591 Shadow Ranch Road, La Mesa, CA 91941. (Dkt. No. 14,

1 FAC ¶ 6.) Around March 12, 2008, Plaintiff refinanced the property with a new loan  
 2 from Countrywide Bank, FSB for \$417,000.<sup>1</sup> (Id. ¶¶ 7, 8.) Defendant Caliber Home  
 3 Loans, Inc. (“Defendant”) is the mortgage servicing company. (Id. ¶ 2.) The loan is  
 4 a “federally related loan, as defined in Title 12, Chapter X, Part 1024, Subpart A,  
 5 Section 1024.2 and subject to other federal statutes, regulations and federal public  
 6 policy.” (Id. ¶ 10.)

7 Plaintiff alleges that Caliber is “subject to the federal Truth in Lending Act, the  
 8 federal Real Estate Settlement Procedures Act, the federal Dodd-Frank Act, [t]he  
 9 California Foreclosure Reduction Act, the federal Consumer Financial Protection  
 10 Bureau (CFPB), the Federal Trade Commission (FTC), Federal Reserve Board (FRB),  
 11 the federal Consumer Financial Protection Bureau (CFPB), the federal Office of the  
 12 Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC),  
 13 and California Department of Business Oversight and regulations such as Title 24,  
 14 Section 203.355 of the Code of Federal Regulations, Fannie Mae (Federal National  
 15 Mortgage Association) (a government sponsored enterprise (GSE)), Ginnie Mae  
 16 (Government National Mortgage Association, Freddie Mac (Federal Home Loan  
 17 Mortgage Corporation) (a government sponsored enterprise (GSE)) Title 24, Section  
 18 203.355 of the Code of Federal Regulations and in statements of policy.” (Dkt. No. 14,  
 19 FAC ¶¶ 13, 20.)

20 Plaintiff also alleges that Defendant is also subject to federal housing public  
 21 policy which requires mortgage servicing companies to have “reasonable policies and  
 22 procedures that have the servicing company act in good faith toward the borrower.”  
 23 (Id. ¶¶ 13, 20.) The public policy is “reflected in statutes such as 12 U.S. Code Sec  
 24 3701-3717. 12 U.S. Code 3751 the federal Truth in Lending Act, the federal Real  
 25 Estate Settlement Procedures Act, the federal Dodd-Frank Act, The California  
 26 Foreclosure Reduction Act, the federal Consumer Financial Protection Bureau (CFPB),

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27  
 28 <sup>1</sup>The FAC states that a copy of the deed of trust for the Shadow Ranch property  
 is attached as Exhibit A but no exhibits are attached to the FAC. (Dkt. No. 14, Compl.  
 ¶ 9.)

1 the Federal Trade Commission (FTC), Federal Reserve Board (FRB), the federal  
 2 Consumer Financial Protection Bureau (CFPB), the federal Office of the Comptroller  
 3 of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), and the  
 4 California Department of Business Oversight and regulations such as Title 24, Section  
 5 203.355 of the Code of Federal Regulations, Fannie Mae (Federal National Mortgage  
 6 Association) (a government sponsored enterprise (GSE)), Ginnie Mae (Government  
 7 National Mortgage Association, Freddie Mac (Federal Home Loan Mortgage  
 8 Corporation) (a government sponsored enterprise (GSE)) Title 24, Section 203.355 of  
 9 the Code of Federal Regulations and in statements of policy.” (Id. ¶ 15(emphasis in  
 10 original).) Plaintiff also alleges a violation of California housing law public policy.  
 11 (Id. ¶¶ 19, 20.)

12 Plaintiff alleges that a notice of default was recorded twenty-five months after  
 13 the date of his last payment in May 2013.<sup>2</sup> (Id. ¶ 25.) Plaintiff’s loan amount, along  
 14 with the late fees, is about \$600,000. (Id. ¶ 27.) Caliber is entitled to receive about  
 15 \$250 per month even while the loan is in default and Caliber will receive all the money  
 16 once the foreclosure sale is complete. (Id.) According to Plaintiff, Caliber has an “in-  
 17 house policy of never filing a notice of default when they could and should on time .  
 18 .. [which is] in direct violation of their contract with the mortgage pool trustee, and this  
 19 policy was in direct violation of the above requirements by the federal and California  
 20 laws and entitles to have reasonable policies and procedures towards borrowers and  
 21 Plaintiffs.” (Id. ¶ 14.) Caliber delayed filing a notice of default to increase its revenue  
 22 unlawfully in order to receive revenue in the amount of millions of dollars per month.

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24 <sup>2</sup>Defendant’s RJN reveals that after Plaintiff defaulted on his loan in 2011, on  
 25 April 7, 2011 a notice of default and election to sell under deed of trust was recorded.  
 26 (Dkt. No. 19-2, D’s RJN, Ex. B.) Caliber was not the servicer of the loan at that time.  
 27 (See id.) On January 23, 2013, the pending foreclosure proceeding was cancelled. (Id.,  
 28 Ex. C.) In 2013 Plaintiff filed for Chapter 13 bankruptcy three times. (Id., Exs. D-F.)  
 In May 2013, Plaintiff alleges he defaulted on his loan which was also around the time  
 he filed for bankruptcy the second time. (Dkt. No. 14, FAC ¶ 25; Dkt. No. 19-2, D’s  
 RJN, Ex. E.) In June 2015 another notice of default was recorded. (Dkt. No. 19-2, D’s  
 RJN, Ex. G.) In September 2015, a notice of trustee’s sale was recorded. (Id., Ex. H.)  
 Plaintiff filed his Complaint in November 2015. (Dkt. No. 1-2, Compl.)

1 (Id.) “Over 20% of the notices of default were filed in San Diego County over eight  
2 months late at the time this lawsuit was filed.” (Id.)

3 According to the FAC, “Federal housing law public policy concerning  
4 foreclosures of Federally related residential loans in California requires mortgage  
5 servicers to pursue the nonjudicial foreclosure of Federally related residential loans in  
6 a timely and competent manner with due diligence.” (Id. ¶ 21.) The “Federal housing  
7 law policy” sets reasonable time periods for when a notice of default must be filed after  
8 default and a reasonable time period for completion of the foreclosure process. (Id. ¶  
9 22.)

## 10 Discussion

### 11 A. Request for Judicial Notice

12 Defendant filed a request for judicial notice. (Dkt. No. 19-2.) Plaintiff has not  
13 opposed.

14 In ruling on a motion to dismiss pursuant to Rule 12(b)(6), a Court may consider  
15 exhibits attached to the complaint, matters subject to judicial notice, or documents  
16 necessarily relied on by the complaint whose authenticity no party questions. See  
17 Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007); Lee v. City of Los Angeles,  
18 250 F.3d 668, 688–689 (9th Cir. 2001); United States v. Ritchie, 342 F.3d 903, 908  
19 (9th Cir.2003) (“A court may, however, consider certain materials-documents attached  
20 to the complaint, documents incorporated by reference in the complaint, or matters of  
21 judicial notice-without converting the motion to dismiss into a motion for summary  
22 judgment.”).

23 Here, Defendant seeks judicial notice of documents of public record containing  
24 documents filed with the San Diego County Recorder’s office and the docket report of  
25 Plaintiff’s three Chapter 13 bankruptcy petitions. (Dkt. No. 12-2.) Since Plaintiff does  
26 not object and the Court may take judicial notice of “matters of public record”, Lee,  
27 250 F.3d at 688-89, the Court GRANTS Defendant’s request for judicial notice.

**B. Legal Standard on Federal Rule of Civil Procedure 12(b)(6)**

Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. See Balistreri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th Cir. 1990). Under Federal Rule of Civil Procedure 8(a)(2), the plaintiff is required only to set forth a “short and plain statement of the claim showing that the pleader is entitled to relief,” and “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

A complaint may survive a motion to dismiss only if, taking all well-pleaded factual allegations as true, it contains enough facts to “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Id. “In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted). In reviewing a Rule 12(b)(6) motion, the Court accepts as true all facts alleged in the complaint, and draws all reasonable inferences in favor of the plaintiff. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

Where a motion to dismiss is granted, “leave to amend should be granted ‘unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.’” DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well

1 Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to  
 2 amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at  
 3 658; Schreiber, 806 F.2d at 1401.

#### 4 **C. Failure to Cure Deficiencies in First Amended Complaint**

5 In the Court's prior order granting Defendant's motion to dismiss, it concluded  
 6 that Plaintiff did not assert any facts or legal authority that his loan was subject to 12  
 7 U.S.C. § 3701 *et seq.* and 24 C.F.R. § 203.355, and that he failed to allege a plausible  
 8 claim of a "Federal housing law public policy" based on agency statutes, regulations,  
 9 rules and/or guidelines. (Dkt. No. 13 at 6.) Furthermore, the Court explained that even  
 10 if there was a "Federal housing law public policy" that created a private right of action,  
 11 Plaintiff did not allege that Caliber was the servicer at the time he defaulted on his loan  
 12 and subject to liability under the alleged "Federal housing law public policy."

13 Plaintiff has failed to cure the deficiencies when he filed the The FAC still  
 14 alleges a "Federal housing law public policy" based on the similar or same statutes,  
 15 regulations, rules and/or guidelines alleged in the prior complaint and fails to amend  
 16 to cure the deficiencies that the Court noted in its order. (See Dkt. No. 14, FAC ¶¶ 13,  
 17 20.) Moreover, general allegations that Defendant violated numerous statutes and  
 18 regulations, by merely reciting their titles, are not sufficient to state a claim. See Iqbal,  
 19 129 S. Ct. at 1940. As such, Plaintiff fails to state a claim based on "Federal housing  
 20 law public policy." As for a violation of "California housing public policy", which is  
 21 summarily alleged, Plaintiff fails to identify the legal basis for such a violation.  
 22 Accordingly, Plaintiff fails to state a claim for violation of "California housing public  
 23 policy."

24 The Court also noted that even if the alleged "Federal housing law public policy"  
 25 created a private right of action, Plaintiff had not alleged that Caliber was the servicer  
 26 at the time he defaulted his loan in May 2013. The FAC does not cure this deficiency  
 27 and fails to allege facts that Caliber was the servicer of the loan at the time Plaintiff  
 28 defaulted on his loan. For this reason also, Plaintiff fails to state a claim based on



1 “Federal housing law public policy.”

2 Lastly, in the prior order, the Court granted Defendant’s motion to dismiss the  
3 state law claims of negligence, intentional infliction of emotional distress and breach  
4 of the covenant of good faith and fair dealing because these causes of action were  
5 premised on Defendant’s violation of “Federal housing law public policy” and failing  
6 to comply with alleged foreclosure time requirements. Since Plaintiff failed to state a  
7 claim based on Defendant’s failing to timely file a notice of default, then the state law  
8 causes of action based on the same failure necessarily failed. Again, the state law  
9 causes of action in the FAC are still dependent on an alleged violation of “Federal  
10 Housing law public policy.” (Dkt. No. 14, FAC ¶¶ 15, 30, 39.) Therefore, because the  
11 FAC has not corrected the deficiencies noted in the Court’s prior order, the Court  
12 GRANTS Defendant’s motion to dismiss the state law causes of action.

13 Alternatively, even if Plaintiff alleged an underlying “Federal housing law public  
14 policy,” Plaintiff’s state law claims still fail to state a claim. Defendant moves to  
15 dismiss the state law causes of action of negligence, intentional infliction of emotional  
16 distress, and bad faith breach of contract.<sup>3</sup> (Dkt. No. 19-1.) Plaintiff opposes.

#### 17 **D. Negligence**

18 Plaintiff alleges Caliber was negligent for failing to timely file a notice of default  
19 on Plaintiff’s loan when he defaulted. (Dkt. No. 14, FAC ¶ 12.) This failing to timely  
20 file a notice of default is based on a “Federal housing law public policy” which is  
21 reflected in

22 statutes such as 12 U.S. Code Sec 3701-3717, 12 U.S. Code 3751 the  
23 federal Truth in Lending Act, the federal Real Estate Settlement  
24 Procedures Act, the federal Dodd-Frank Act, The California  
25 Foreclosure Reduction Act, the federal Consumer Financial Protection  
26 Bureau (CFPB), the Federal Trade Commission (FTC), Federal  
Reserve Board (FRB), the federal Consumer Financial Protection  
Bureau (CFPB), the federal Office of the Comptroller of the Currency  
(OCC), Federal Deposit Insurance Corporation (FDIC), and the  
California Department of Business Oversight and regulations such as

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27  
28 <sup>3</sup>Defendant also argue that the Court should dismiss the civil conspiracy claim,  
(Dkt. No. 19-1 at 9); however, the FAC does not allege a civil conspiracy cause of  
action.

1 Title 24, Section 203.355 of the Code of Federal Regulations, Fannie  
 2 Mae (Federal National Mortgage Association) (a government  
 3 sponsored enterprise (GSE)), Ginnie Mae (Government National  
 4 Mortgage Association, Freddie Mac (Federal Home Loan Mortgage  
Corporation) (a government sponsored enterprise (GSE)) Title 24,  
 Section 203.355 of the Code of Federal Regulations and in statements  
 of policy.

5 (Id. ¶ 15.)

6 Under California law, the elements of a claim for negligence are that: (1)  
 7 defendant had a legal duty to plaintiff, (2) defendant breached this duty, (3) defendant  
 8 was the proximate and legal cause of plaintiff's injury, and (4) plaintiff suffered  
 9 damage. Cal. Civ. Code § 1714; Merrill v. Navegar, Inc., 26 Cal. 4th 465, 500 (2001).  
 10 "The existence of a legal duty to use reasonable care in a particular factual situation  
 11 is a question of law for the court to decide." Vasquez v. Residential Invs., Inc., 118  
 12 Cal. App. 4th 269, 278 (2004). As a general rule, under California law, "a financial  
 13 institution owes no duty of care to a borrower when the institution's involvement in the  
 14 loan transaction does not exceed the scope of its conventional role as a mere lender of  
 15 money." Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1095-96  
 16 (1991). However, "liability to a borrower for negligence arises only when the lender  
 17 actively participates in the financed enterprise beyond the domain of the usual money  
 18 lender." Id. at 1096. This general duty of care has been applied to loan servicers. See  
 19 Osei v. Countrywide Home Loans, 692 F. Supp. 2d 1240, 1249-50 (E.D. Cal. March  
 20 3, 2010) (defendant was lender and servicer); McCormick v. U.S. Bank, NA, 12cv433-  
 21 AJB(WMC), 2013 WL 990946, at \*7 (S.D. Cal. Mar. 13, 2013) (stating that general  
 22 rule that a financial institution owes no duty of care to a borrower applies to loan  
 23 servicers); Shepherd v. Am. Home Mortg. Servs., No. Civ. 09-1916 WBS GGH, 2009  
 24 WL 4505925, at \*2 (E.D. Cal. 2009) ("[L]oan servicers do not owe a duty to the  
 25 borrowers of the loans they service.").

26 The question of whether a servicer owes a duty of care to a borrower is subject  
 27  
 28



1 to a balancing of the so-called Biakanja<sup>4</sup> factors. Anderson v. Deutsche Bank Nat'l  
 2 Trust Co Americas, 649 Fed. App'x 550, 552 (9th Cir. 2016) (applying Biakanja  
 3 factors to determine if duty of care existed between servicer and borrower). These  
 4 factors include: "the extent to which the transaction was intended to affect the plaintiff,  
 5 the foreseeability of harm to him, the degree of certainty that the plaintiff suffered  
 6 injury, the closeness of the connection between the defendant's conduct and the injury  
 7 suffered, the moral blame attached to the defendant's conduct, and the policy of  
 8 preventing future harm." Biakanja, 49 Cal. 2d at 650. As noted by the court of appeal  
 9 in Lueras v. BAC Home Loans Serv., LP, 221 Cal. App. 4th 49, 67 (2013), in  
 10 addressing the Biakanja factors concerning whether there is a duty of care to modify  
 11 a loan, the court noted that the harm suffered by the borrower as a result of the lender's  
 12 delay was not closely connected to the lender's conduct because it was the borrower's  
 13 inability to repay the loan that required the borrower to seek a loan modification.  
 14 Similarly, in this case, the notice of default was necessitated by Plaintiff's default on  
 15 the loan and not Caliber's delay in filing the notice of default so no "moral blame"  
 16 attaches to the servicer's conduct.

17 In balancing the Biakanja factors in a factually similar case with factually similar  
 18 arguments<sup>5</sup>, the district court in Jose held that there was no duty of care owed by  
 19 servicer to borrower where the borrower alleged that the servicer filed a late notice of  
 20 default. Jose v. Select Portfolio Serv., Inc., Case No: 16cv106-MMA(RBB), 2016 WL  
 21 4581394, at \*5 (S.D. Cal. Aug. 8, 2016) (no duty of care between borrower and  
 22 servicer where plaintiff alleges a late filing of a notice of default).

23 Similarly, the Court concludes that the Biakanja factors does not impose a duty  
 24 of care where the negligence claim is based on delays in filing a notice of default. See  
 25 Anderson, 649 Fed. App'x at 552 (no duty of care where borrower alleged delays in the  
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27 <sup>4</sup> Biakanja v. Irving, 49 Cal.2d 647 (1958).

28 <sup>5</sup>The Court notes that Plaintiff's attorney in Jose is the same attorney as in this case.

1 processing of their loan modification applications).

2 Plaintiff does not sufficiently allege facts that Caliber, by filing a notice of  
3 default, exceeded the scope of its conventional role as a servicer. Moreover, Plaintiff  
4 concedes he defaulted on his loan; therefore, Caliber had authority to file a notice of  
5 default. Furthermore, Plaintiff has not demonstrated that any alleged delay in recording  
6 a notice of default is unlawful or against an alleged “public policy.” Therefore, the  
7 Court concludes that Plaintiff has not demonstrated Caliber owed Plaintiff a duty to not  
8 file a late notice of default. Accordingly, the Court GRANTS Defendant’s motion to  
9 dismiss the negligence cause of action.

#### 10 **E. Intentional Infliction of Emotional Distress**

11 The FAC generally alleges that Defendants’ conduct of delaying the filing of the  
12 notice of default was done with “malicious and wanton intent and reckless disregard  
13 for the probability of causing Plaintiff to suffer humiliation, mental anguish, and  
14 emotion and physical distress.” (Dkt. No. 14, FAC ¶ 31.) Defendant “engaged in this  
15 outrageous conduct towards Plaintiff with reckless disregard for the probability of  
16 causing Plaintiff to suffer severe emotional distress. As a proximate result of said  
17 outrageous conduct, Plaintiff has suffered and continues to suffer extreme mental  
18 distress, and humiliation all to her damage in amounts to be proven at trial.” (*Id.* ¶ 32.)

19 Defendant argues that debt collection efforts, by themselves, are not sufficient  
20 to support a claim of intentional infliction of emotional distress. Plaintiff opposes but  
21 cites to no cases to support his position that a filing a late notice of default constitutes  
22 extreme and outrageous conduct.

23 The tort of intentional infliction of emotional distress is comprised of three  
24 elements: (1) extreme and outrageous conduct by the defendant with the intention of  
25 causing, or reckless disregard of the probability of causing, emotional distress; (2) the  
26 plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff’s injuries  
27 were actually and proximately caused by the defendant’s outrageous conduct. Cochran  
28 v. Cochran, 65 Cal. App. 4th 488, 494 (1998). The California Supreme Court has set

1 a “high bar” to demonstrate severe emotional distress. Hughes v. Pair, 46 Cal. 4th  
 2 1035, 1051 (2009). “Severe emotional distress means ‘emotional distress of such  
 3 substantial quality or enduring quality that no reasonable [person] in civilized society  
 4 should be expected to endure it.’” Id. (citation omitted).

5 Courts have held that recording a notice of default and a threat of foreclosure do  
 6 not constitute outrageous conduct. Anguiano v. Bank of America, No. 12cv1752-  
 7 IEG(BLM), 2013 WL 485765, at \*2 (S.D. Cal. Feb. 6, 2013) (citing Aguinaldo v.  
 8 Ocwen Loan Servicing, LLC, No. 12cv1393-EJD, 2012 WL 3835080, at \*7 (N.D. Cal.  
 9 Sept. 4, 2012) (“as a matter of law that foreclosing on property does not amount to the  
 10 ‘outrageous conduct’”); Mehta v. Wells Fargo Bank, N.A., 737 F. Supp. 2d 1185, 1204  
 11 (S.D. Cal. 2010) (“The fact that one of Defendant[-lenders’] employees allegedly stated  
 12 that the sale would not occur but the house was sold anyway is not outrageous as that  
 13 word is used in this context.”); Harvey G. Ottovich Revocable Living Trust Dated May  
 14 12, 2006 v. Wash. Mut., Inc., No. 10-2842 WHA, 2010 WL 3769459, at \*4-5, \*13  
 15 (N.D. Cal. Sept. 22, 2010) (neither act nor threat of foreclosure by itself does not  
 16 constitute outrageous conduct)). “Where a lending party in good faith asserts its right  
 17 to foreclose according to contract, however, its conduct falls shy of ‘outrageous,’  
 18 however wrenching the effects on the borrower.” Davenport v. Litton Loan Serv., LP,  
 19 725 F. Supp. 2d 862, 884 (N.D. Cal. 2010).

20 Here, Plaintiff alleges that the notice of default should have been filed earlier  
 21 than it was but based on the above cited case, such conduct does not arise to extreme  
 22 and outrageous conduct. Accordingly, the Court GRANTS Defendant’s motion to  
 23 dismiss the claim for intentional infliction of emotional distress.

#### 24 **F. Breach of the Covenant of Good Faith and Fair Dealing**

25 The FAC alleges “bad faith breach of contract” or breach of the covenant of  
 26 good faith and fair dealing. (Dkt. No. 14, FAC ¶ 33.) Defendant improperly construes  
 27 this cause of action as a breach of contract claim and moves to dismiss on this basis.  
 28 Contrary to Defendant’s position, the FAC specifically asserts a cause of action for

1 breach of the covenant of good faith and fair dealing.

2 ““Every contract imposes upon each party a duty of good faith and fair dealing  
3 in its performance and its enforcement.”” Carma Developers (Cal.), Inc. v. Marathon  
4 Dev. Cal., Inc., 2 Cal. 4th 342, 371 (1992) (citing Rest. 2d Contracts, § 205). “This  
5 covenant [of good faith and fair dealing] not only imposes upon each contracting party  
6 the duty to refrain from doing anything which would render performance of the  
7 contract impossible by any act of his own, but also the duty to do everything that the  
8 contract presupposes that he will do to accomplish its purpose.” Harm v. Frasher, 181  
9 Cal. App. 2d 405, 417 (1960) (citing Bewick v. Mecham, 26 Cal. 2d 92, 99 (1945)).  
10 “It is universally recognized the scope of conduct prohibited by the covenant of good  
11 faith is circumscribed by the purposes and express terms of the contract.” Carma  
12 Developers, 2 Cal. 4th at 373. “Importantly, it is also well settled “[t]he prerequisite for  
13 any action for breach of the implied covenant of good faith and fair dealing is the  
14 existence of a contractual relationship between the parties, since the covenant is an  
15 implied term in the contract.” Smith v. City and Cnty. of San Francisco, 225 Cal. App.  
16 3d 38, 49 (1990). “Without a contractual underpinning, there is no independent claim  
17 for breach of the implied covenant.” Fireman’s Fund Ins. Co. v. Maryland Casualty  
18 Co., 21 Cal. App. 4th 1586, 1599 (1994).

19 Here, the FAC does not allege a contract between Plaintiff and Defendant.  
20 Therefore, there can be no cause of action for breach of the covenant of good faith and  
21 fair dealing. To the extent Plaintiff is alleging breach of the terms of the Deed of Trust,  
22 or the promissory note, there is no allegation that Caliber was a party to those  
23 documents either. Accordingly, the Court GRANTS Defendant’s motion to dismiss the  
24 cause of action for breach of the covenant of good faith and fair dealing.

## 25 **G. Leave to Amend**

26 In the Court’s prior order, Plaintiff was granted leave to amend the complaint to  
27 correct the deficiencies noted by the Court and failed to do so. Moreover, Plaintiff  
28 does not seek leave to amend the FAC. Based on the Plaintiff’s failure to amend and


1 allege facts to support his allegations, the Court concludes that any further leave to  
2 amend would be futile. See DeSoto., 957 F.2d at 658.

3 **Conclusion**

4 Based on the above, the Court GRANTS Defendant's motion to dismiss all state  
5 law causes of action with prejudice. The hearing set for November 18, 2016 shall be  
6 **vacated.** The Clerk of Court shall close the case.

7 IT IS SO ORDERED.

8  
9 DATED: November 14, 2016

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11 HON. GONZALO P. CURIEL  
12 United States District Judge  
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